

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

AETNA INC., and HUMANA INC.,

Defendants.

Civil Action No. 1:16-cv-1494-JDB
(Submitted to the Special Master
The Hon. Richard A. Levie (Ret.))

OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

The United States submits this response and [REDACTED]

[REDACTED] in opposition to Defendants' motion to compel. Defendants have not demonstrated a substantial need that justifies intruding on deliberations among senior HHS leaders on [REDACTED]

1. The document is predecisional. The Supplemental Declaration describes—and it is clear from its face—how the document was intended [REDACTED]

[REDACTED] The reasoning contained in the document has never been disclosed and deliberations about issues raised in the memorandum are ongoing. (Ex. 1 at ¶9.) “[E]ven if an internal discussion does not lead to

adoption of a specific government policy, its protection . . . is not foreclosed as long as the document was generated as part of a definable decision-making process.” *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve System*, 762 F. Supp. 2d 123, 135–36 (D.D.C. 2011).

2. Both portions of the document are deliberative. [REDACTED]

[REDACTED]

[REDACTED] As such, it embodies the type of candid “give and take” about possible future agency action that the deliberative process privilege protects. *See Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1425, 1435 (D.C. Cir. 1992) (“[T]he process of selecting among alternative policies can be delicate and audience-sensitive, susceptible to distortions and vulnerable to fudging when the deliberators fear or expect public reaction.”) Deliberation is also evident from [REDACTED]

[REDACTED]

[REDACTED] Disclosure would unfairly suggest that these analyses and predictions are an “agency position” instead of “only a personal position.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[B]ecause the privilege serves to protect the deliberative process itself, not merely documents containing deliberative material,” *Mapother v.*

Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993), materials that reflect “exercises of discretion and judgment calls” may be properly withheld. *Id.* at 1539.

Were HHS required to disclose the document—which was both deliberative when written and used to support ongoing deliberations among senior departmental leaders—ASPE “would lose an atmosphere of candor and experimentation crucial to the mutable field of economic analysis” and chill ASPE’s participation in future decision-making. *Lone Star Indus. v. FTC*, 1984 WL 21979 at *8 (D.D.C. Mar. 26, 1984).

3. Segregation is inappropriate. Partial disclosure of the document, including the portions specifically identified in Defendants’ motion, is inappropriate because it would expose not “purely factual material” but internal HHS economic analyses and judgments that were meant to be “uninhibited opinions and recommendations” on the issues and policy options discussed. *Coastal States*, 617 F.2d at 866; (Ex. 1 at ¶10.)

4. Defendants do not need the privileged materials. The parties exchanged initial expert reports yesterday. Defendants now have [REDACTED] [REDACTED] Thus Defendants cannot demonstrate a substantial need to invade HHS’s deliberative process. Moreover, [REDACTED] [REDACTED] [REDACTED] further demonstrating that Defendants may do their work independently and “do not require access to the actual inferences and models used by [HHS.]” R.&R. No. 1 at 19, *United States v. US Airways*, 1:13-cv-01236-CKK, (D.D.C. Doc. 106, filed Oct. 10, 2013)).

The United States respectfully requests the Special Master deny Defendants' motion.

Respectfully submitted,

/s/ Peter J. Mucchetti

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Date: October 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2016, a true and correct copy of the foregoing was served on all counsel of record by email and ECF pursuant to the order appointing the Special Master (ECF No. 53).

Date: October 22, 2016

/s/ Peter J. Mucchetti

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EXHIBIT 1
(REDACTED)